(1)

Supreme Court, U.S.
FILED

No. 041098

FEB 9 - 2005
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IN THE

SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENT

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the state judiciary violated Petitioner's Constitutional rights to Due Process of law under the Fifth And Fourteenth Amendment, by refusing to allow him to present the damages element in a cause of action in tort?

II. Whether singling out a litigant whose damages in a common-law tort must be calculated with reference to workers compensation rules and statutes for treatment disparate from other litigants, violated the equal protection clause?

PARTES TO THE PROCEEDING

All parties appear in the caption of this case, on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the decisions below:

The Summary Disposition Order ("SDO") of the Hawaii Supreme Court, appears at the Appendix ("Appen.") of this Petition, and is unpublished.

JURISDICTION

The date on which the Supreme Court of The State of Hawaii affirmed the trial court was on November 12, 2004. Appen "A".

The jurisdiction of this Court is invoked under 28 §1257(a), or Rule 10(b) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property,**

without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE XIV. - 1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Other Provisions Appended Hereto

A. Hawaii Revised Statutes, Sections §386-73, §663.1.

STATEMENT OF THE CASE

A. Parties:

Petitioner, Emerson M.F. Jou, M.D. is a physician in private practice in Honolulu, Hawaii. He is board-certified in physiatry. Schneiden v. Chavez-Munoz, 9 Neb.App.579, 586, 616 N.W.2d 46, 53 (App. 2000); Bocalbos v. Kapiolani Med. Ctr., 93 Haw. 116, 119 fn.12, 997 P.2d 42, 45 (App. 2000).

Respondent First Insurance Company of Hawaii Ltd., (FICOH) is an insurance company selling worker's compensation, automobile, and other property and casualty (P&C) insurance. In 2002, Hawaii P&C insurer's premiums, other than for life and annuity policies, totaled $1,796,690,502.00, while their claims benefits were only $708,842,399.00. Report of The Insurance Commissioner of Hawaii 2003 ("Cmr. Rpt") at 45. FICOH's 2002 Hawaii premiums were $72,328,085.00 against claims benefits paid of only $25,057,890.00. Id at 19.

The nearly 1.8 billion in premium charged by these insurers for insurance which includes health coverage overlaps with another $2.1 billion Hawaii residents paid to their HMOs and mutual benefit societies for health insurance. Id at 47. Added to this $3.9 billion burden on +1.2 million Hawaii residents, is another ±1.5 billion for life insurance and annuity premiums.

The effect of this money machine on the Hawaii Judiciary was noted to this court in a previous petition for certiorari, **S.C.U.S. No. 04-355.** Three out of nine individuals who approve selection and retention of state judges receive significant income from insurance companies. See **Jou v. First Insurance Com. Of Hawaii Ltd., S.Ct. No. 04-355,** Petition of Certiorari at pages 20-22.

B. Facts:

On or about August 27, 1998, Petitioner was denied credit by a lender (not a party to this suit). Op. Br. 1. The reason was that Respondent had maintained on record a judgment lien from a judgment against Petitioner, which had been paid.

At a jury trial for abuse of process and defamation the state court refused to allow Petitioner to present significant damages to the jury, because computation merely involved methods employed in worker's compensation cases. The state trial court decided these damages were thereby outside of its jurisdiction because they were precluded by the exclusivity bar of Hawaii's worker's compensation law. III RA (Record on Appeal, Hawaii Supreme Court) 267-268.

C. Federal Questions Preserved For Review

Federal questions were raised to the trial court before the case went to the jury, by motion in limine on the ground, inter alia that an earlier ruling excluding these damages (VIII RA 333) was in violation of Petitioner's "Federal and State constitutional rights to equal protection, due process, access to the courts; and, to petition for grievances." VIII RA 93. Petitioner added that the in limine orders "deprived Plaintiff of the equal protection of decisional authority, interpreting the Hawaii worker's comp. scheme. Workers in this State and their representatives fought long and hard for basic tort remedies for separate and additional injuries." VIII RA 96, 96. The trial court passed on this motion by denying it. VIII RA 208.

On appeal before the Hawaii Supreme Court, Petitioner again raised federal questions that, by misapplying the worker's compensation exclusivity bar, the trial court violated Petitioner's federally guaranteed

rights to equal protection, and due process of law. The opening brief stated, in salient part:

> "B. **Points OF Error On Which Appellant Intends To Rely**
>
> **1. Court Erroneously Applied Worker's Compensation Exclusivity Doctrine**
>
> The trial court refused, based upon erroneous application of the exclusivity bar, in Hawaii worker's compensation law, to permit Appellant to present the vast bulk of his damages case to the jury; and in so refusing, denied Dr. Jou equal protection, and due process of law, in violation of the State and Federal Constitution. This error is found in the "Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment Filed August 20, 2001". IXR 35-37.
>
> The Circuit Court mistakenly characterized FICOH's conduct as calculating worker's compensation medical payments; in fact, FICOH was deciding, at its leisure, how much of Dr. Jou's medical reimbursements to withhold from Dr. Jou, and instead apply to the satisfaction FICOH's Circuit Court money judgment. The erroneous actions by the Court helping the insurer were brought to its attention during oral argument on the MSJ. Nonetheless, the Court ruled (*Id* at VIIR 227, 278) . . ."

The Hawaii Supreme Court did not pass on the federal questions raised both in the trial court and in Petitioner's brief before it, on the merits. See Summary Disposition Order (SDO) dated 11-12-04. Appendix to Petition ("Appen").

ARGUMENT

A. The Petition Should Be Granted Because The State Courts Consistently Violate Rights To Due Process In Tort Cases Relating To Worker's Compensation

This case is similar to Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1930).

In Hawaii, administrative agencies have no jurisdiction to decide common law torts of abuse of process or defamation. Compare these two sections of Hawaii Revised Statutes ("HRS"): §663.1 and §386-73. Appen. To prove damages in common law tort cases which relate, as here, to state worker's compensation claims, it is often necessary to make computations similar to those made in the worker's compensation agency. See SDO at 2 ¶2. Appen.

The state courts arbitrarily and unreasonably deprived Petitioner of his right to prove tort damages, which might have involved a private insurance company's calculations in a worker's compensation setting. Id. This conduct by the state courts violated the due process clause of the Fourteenth Amendment to the United States Constitution, in that these courts left Petitioner without a tort remedy, in a tort case tried to a jury. Allstate Ins. v. Hague, 449 U.S. 302, 311, 101 S.Ct. 633 639 (1981).

The jury at Bench found that Respondent First Insurance Company of Hawaii was liable to Petitioner Jou, for abuse of process but that the insurer did not legally cause any damages to Petitioner. SDO at 1. Appen. The jury found no liability on the defamation tort.

The in limine orders and refusal to admit evidence of the Respondent's calculations in the worker's comp. system misled the jury into finding no damages. The trial judge and the Hawaii Supreme Court violated their duties to avoid leaving injured parties without a remedy. "Law exists for society and the instincts of right and wrong must be given effect by the courts whenever reasonable interpretation of law and laws permit." UMW v. Coronado Coal Co., 259 U.S. 344, 42 S.Ct. 570 (1922).

In Brinkerhoff-faris Trust & Sav. Co. v. Hill, supra, 291 U.S. at 681-682, this Court struck down as a violation of due process a state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds.

Similarly, the Hawaii courts denied Petitioner the opportunity to prove tort damages, which involved an assertion that a worker's compensation insurer (Respondent) incorrectly calculated the amounts Petitioner, a worker's physician, should have been paid. SDO 2 at §2. At the time, these courts were fully aware that the worker's compensation agency, had no forum or jurisdiction to adjudicate the common law tort of abuse of process. HRS §663.1.

B. Actions By Hawaii State Courts Violated The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution

1. **Background**

The jury was led to believe by the trial court that it would determine the Petitioner's damages, by this instruction:

"The essential elements of a claim for abuse of process are:

1. An ulterior purpose,
2. A willful act in the use of a legal process not proper in the regular conduct of the proceeding, and
3. Damages.

If a judicial process was used for its intended purpose, then there is no abuse of process." *Id.*

XIRA 255, 269 (pg. 24); also Petitioner's Opening Brief (Op. Br.) below at 12; also BAJ1 No. 7.72 (7th Ed. 1986).

The jury was not permitted to decide the tort by the trial court's exclusion of damages it perceived were barred by the worker's compensation scheme. SDO 2 ¶2 (upheld) Appen. Moreover, the jury was kept from deciding the element of improper purpose, which like many abuse of process cases, involved the surrender of property, or the payment of money. Christensen v. Younger, 47 Cal.App.3d 613, 618, 120 Cal.Rptr.923 (1975).

2. State Court's Misconduct Does not Survive Rational Basis Review

Even if the statute upon which the Hawaii Supreme Court upheld the trial court's exclusion of damages contained terms expressly allowing the exclusion of evidence of damages, the state intentionally and

irrationally discriminated against other victims of the common law tort of abuse of process. Romer v. Evans, 517 U.S. 620, 634-35, 116 S.Ct. 1620 (1996).

None of the state courts articulated any rational basis for the difference in treatment between victims of abuse of process who must prove their damages by recourse to worker's compensation schedules versus those who do not. The statute referenced in the SDO is equally silent. Neither state court took the time to note that damages were but one element of a tort dispute, properly outside of Hawaii worker's compensation system.

The irrationality of the Hawaii Supreme Court's decision is also supported by the fact that it elected not to publish its decision, which remains at odds with published precedent by the same court. This clash indicates intemperate selectivity, or sheer animus toward Petitioner. Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073 (2000).

As early as 1996, the Hawaii Supreme Court had to reverse a trial court and make clear that Hawaii's exclusivity doctrine in its worker's compensation scheme did not bar separate claims against insurers for intentional torts in claims processing. Hough v. Pacific Insurance Co., 83 Haw. 457, 927 P.2d 858 (1996). Sadly, the trial court judgment in Hough was entered nearly four years before it was reversed (on March 25, 1992), and the injury to the worker took place on March 13, 1985 about eleven years before the Hawaii Supreme Court's decision. Id.

The case at Bench illustrates that Hawaii trial judges resisted, and refused to apply the principles underlying Hough.

In 1999, the Hawaii Supreme Court again had to apply the principles underlying Hough to a trial court decision which occurred prior to the Hough reversal. Catron v. Tokio Marine Mgmt, 90 Haw. 407, 410, 978 P.2d 845, 848 (1999).

While Petitioner was not a claimant, as were Hough and Catron, he sued Respondent insurer for intentional torts which were similarly separate and unrelated to the work injury. In fact, Petitioner's cause of action for abuse of process involved misuse of a judgment lien which had been paid. This judgment incidentally involved worker's compensation because Respondent asserted it applied worker's compensation medical fee schedules used to compute it. This was far more attenuated from the exclusivity doctrine, than Hough and Catron.

3. Impingement Of Fundamental Rights Requires Heightened Standard Of Review

The laws, and their application in this case are to be subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest, in that the courts below impinged "on personal rights protected by the constitution." City of Cleburne v. Cleburn Living Ctr., 473 U.S. 432, 440, 105 S.Ct 3249 (1985).

As Hough and Catron clearly show, Hawaii trial judges repeatedly deny access of common law torts to the courts. Appellate delay compounds the problem. Conduct in these, and in the case at Bench, deprive and chill access to the courts, which is one aspect of the right to petition guaranteed by the First Amendment to the United States Constitution. Be&K Construction Co. v. NLRB, 536 U.S.

516, 525, 122 S.Ct. 2390, 2396 (2002). There must be a substantial regulatory purpose, not shown in this case at SDO (Appen), to justify depriving a litigant of his right to petition the courts when an element of proof relates to a worker's compensation computation. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7, 94 S.Ct. 1113, 1117 (1964); NAACP v. Button, 371 U.S. 415, 452, 83 S.Ct. 328, 348 (1963).

This right of petition requires strict scrutiny under equal protection analysis. It is cast as guaranteed by both the 14th and 1st amendments. Brown v. Louisiana, 383 U.S. 131, 141, 86 S.Ct. 719, 723 (1966).

The second fundamental right impinged by the equal protection violation, was petitioner's right to a jury trial under the Seventh Amendment to the United States' Constitution. This included the right to try all elements of a case properly before the state courts, to a jury.

CONCLUSION

Petitioner requests that this petition be granted.

Dated: Honolulu, Hawaii, February 9, 2005.

Respectfully Submitted,

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Attorney For Petitioner
EMERSON M.F. JOU, M.D.

*** NOT FOR PUBLICATION ***

NO. 25093

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

EMERSON M.F. JOU, M.D., Plaintiff-Appellant,

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,
Defendant-Appellee,

And

JOHN DOE 1 to 10, DOE CORPORATION 1 to 10,
DOE PARTNERSHIP 1 to 10, and DOE ENTITY 1 to 10,
Defendants.

Appendix A

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-2490)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Plaintiff-Appellant Emerson M.F. Jou, M.D. appeals from the June 13, 2002 final judgment of the Circuit Court of the First Circuit[1] entering judgment in favor of Defendant-Appellee First Insurance Company of Hawaii, Ltd. (First Insurance). Dr. Jou filed a thirteen count complaint against First Insurance, but only two of these counts, abuse of process and defamation, were submitted to the jury. In a special verdict, the jury found that First Insurance was liable to Dr. Jou on the abuse of process claim, but that First Insurance did not legally cause any damages to Dr. Jou. The jury also found in favor of First Insurance on the defamation claim. On appeal, Dr. Jou argues that the circuit court erred by: (1) applying the worker's compensation "exclusivity doctrine"; (2) finding that Dr. Jou's claims for "other damages" were not in controversy; (3) instructing the jury that Dr. Jou was required to mitigate damages; (4) upholding the discovery master's sanctions; and (5) denying Dr. Jou's request for costs.

Upon carefully reviewing the record and briefs submitted, we hold as follows: (1) the circuit court did not err by concluding that it did not have jurisdiction to consider whether First Insurance correctly calculated the compensation due Dr. Jou for medical care he provided pursuant to Hawaii's workers' compensation law, Hawai`i Revised Statutes (HRS) chapter 386. The director of the Department of Labor and Industrial Relations (Director)

determines the charges and adopts the fee schedules governing compensation for medical care rendered employees incurring a work injury. HRS § 386-21(c) (Supp. 2003). The Director also has original jurisdiction over all disputes arising under HRS chapter 386. HRS § 386-73 (1993) ("[T]he director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under [chapter 386.]"); (2) this court will not consider Dr. Jou's arguments regarding "other damages" because he has not presented a reason for his argument or any authority supporting his argument. Hawai`i Rules of Appellate Procedure (HRAP) Rule 28(b)(7); (3) the circuit court did not err by instructing the jury that Dr. Jou had a duty to mitigate damages because this instruction is a proper statement of Hawai`i law. Tabieros v. Clark Equipment Co., 85 Hawai`i 336, 373, 944 P.2d 1279, 1316 (1997); (4) this court will not consider Dr. Jou's argument that the circuit court erred by denying Dr. Jou's request to strike the discovery master's sanction order because Dr. Jou failed to comply with HRAP Rule 28(b)(4); and (5) the circuit court did not abuse its discretion by denying Dr. Jou's request for costs because he was not the prevailing party. Therefore,

IT IS HEREBY ORDERED that the circuit court's final judgment filed June 13, 2002 is affirmed.

DATED: Honolulu, Hawai`i, November 12, 2004.

On the briefs:

Stephen M. Shaw
for plaintiff-appellant
Emerson M.F. Jou, M.D.

Dennis E.W. O'Connor,
Kelvin H. Kaneshiro,
and Jeffrey K. Hester
(of Reinwald, O'Connor
& Playdon LLP) for
defendant-appellee
First Insurance Company
of Hawaii, Ltd.

1. The Honorable Sabrina S. McKenna presided over this proceeding.

MICHIE'S HAWAII REVISED STATUTES ANNOTATED

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*** ANNOTATIONS CURRENT THROUGH AUGUST 27, 2004 ***

DIVISION 1 GOVERNMENT
TITLE 21 LABOR AND INDUSTRIAL RELATIONS
CHAPTER 386 WORKERS' COMPENSATION LAW
PART III ADMINISTRATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

HRS @ 386-73 (2004)

HRS @ 386-73 LEXSTAT
FIRST OF 2 VERSIONS OF THIS SECTION

@ 386-73 Original jurisdiction over controversies.
[Effective until July 1, 2006]

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the

appellate board and thence to the supreme court subject to chapter 602 as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersede as or stay unless the appellate board or the supreme court so orders.

HISTORY: L 1963, c 116, pt of @ 1; Supp, @ 97-72; HRS @ 386-73; am L 1969, c 244, @ 2b; am L 1979, c 111, @ 18

NOTES:
CROSS REFERENCES -- As to stay, see HRCP, Rule 72(i).

CIRCUIT COURT IS RELEGATED TO SECONDARY ROLE -- This section precludes original court action to settle controversies involving the workers' compensation law.

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DIVISION 4 COURTS AND JUDICIAL PROCEEDINGS
TITLE 36 CIVIL REMEDIES AND DEFENSES AND SPECIAL PROCEEDINGS
CHAPTER 663 TORT ACTIONS
PART I LIABILITY; SURVIVAL OF ACTIONS

<=1> GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

HRS @ 663-1 (2004)

HRS @ 663-1

@ 663-1 Torts, who may sue and for what

Except as otherwise provided, all persons residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses or reciprocal beneficiaries, children under majority, or wards, by such offending party, or the offending party's child under majority, or by the offending party's command, or by the offending party's animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts.

HISTORY: CC 1859, @ 1125; RL 1925, @ 2365; RL 1935, @ 4049; RL 1945, @ 10485; RL 1955, @ 246-1; HRS @ 663-1; am L 1972, c 144, @ 2(a) and c 189, @ 1; am imp L 1984, c 90, @ 1; am L 1997, c 383, @ 65

NOTES:
CROSS REFERENCES -- As to guardian ad litem, see @ 551-2 and HRCP, Rule 17(c);
DCRCP, Rule 17(c). As to affirmative offenses, see HRCP, Rule 8(c); DCRCP, Rule
8(b) and (c).

I General Consideration
II Bailment
III Damages